Appendix A

24-575-pr
Smith v. Hochul

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of October, two thousand twenty-four.

PRESENT:

RICHARD C. WESLEY,
DENNY CHIN,
MARIA ARAÚJO KAHN,
Circuit Judges.

Ken Smith,

Plaintiff-Appellant,

v. 24-575

Kathy Hochul, Governor of New York, Daniel F. Martuscello, Commissioner of DOCCS, Molly Wasow Park, Commissioner of DSS/DHS,

*Defendants-Appellees.**

FOR PLAINTIFF-APPELLANT: Ken Smith, pro se, Malone, NY.

FOR DEFENDANTS-APPELLEES: No appearance.

Appeal from a judgment of the United States District Court for the Northern District of New York (Anne M. Nardacci, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is **AFFIRMED**.

Plaintiff Ken Smith, presently incarcerated in New York and proceeding pro se, brought a 42 U.S.C. § 1983 complaint alleging that a prisoner counselor informed him he would be subject to the residency restrictions of New York's Sexual Assault Reform Act ("SARA"), N.Y. Exec. Law § 259-c(14), upon his eventual release on parole. Contending that the residency restrictions often substantially delay the post-parole release of indigent defendants from New York City,[1] Smith challenged the sources of delay as unlawful. He

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

[1] As relevant here, SARA restricts certain offenders from residing within 1,000 feet of a school upon release from custody. Because many New York City homeless shelters fall within the excluded zone, the New York State Department of Corrections and Community Supervision maintains a waiting list for inmates seeking SARA-compliant shelter beds. *See generally People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187 (2020) (describing SARA and the waiting list).

sought damages from the named defendants—the Governor of New York, and the commissioners of both New York State's Department of Corrections and Community Supervision and New York City's Department of Social Services—as well as injunctive relief.

Significantly, Smith did not allege that he had been paroled, or that he was currently subject to the restrictions, as he will not be parole-eligible until February 2025. Instead, he based his claim on the likelihood that he would at some point be granted parole and required to wait for a shelter bed.

Because Smith filed in forma pauperis and sought redress from a government employee, the district court screened the complaint, *see* 28 U.S.C. §§ 1915(e)(2)(B), 1915A(a), and dismissed it without prejudice for lack of standing and as unripe. The court emphasized that the dismissal was without prejudice to Smith's filing of a new action when he can establish standing and ripeness. Smith appealed. We assume the reader's familiarity with the remaining facts, procedural posture, and issues, to which we refer only as necessary to explain our decision.

We have reviewed the complaint and conducted de novo review, *see BMG Monroe I, LLC v. Vill. of Monroe*, 93 F.4th 595, 600 (2d Cir. 2024), and we affirm for substantially the same grounds identified by the district court. We add only a few comments of our own.

First, a plaintiff bears the burden of demonstrating Article III standing for all forms of relief. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). But Smith's damages claim is based on harm that has not yet occurred, and a "mere risk of future harm" does not confer standing to bring a damages claim absent a separate, concrete harm. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435–37 (2021). Smith alleged suffering from anxiety and loss of hope caused by knowing he might be subject to the restrictions. But a prisoner generally may not bring a federal lawsuit for emotional injuries suffered in custody absent a prior showing of physical injury. *See* 42 U.S.C. § 1997e(e); *Liner v. Goord*, 196 F.3d 132, 134 (2d Cir. 1999).

Second, regarding injunctive relief, we liberally construe Smith's submissions as alleging that he falls into the category of offenders subject to SARA's residency restrictions. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (*per curiam*).[2] But he has not been granted parole and may not be paroled in the near future. Accordingly, we agree with the district court that his claim is premature at this time. *See*

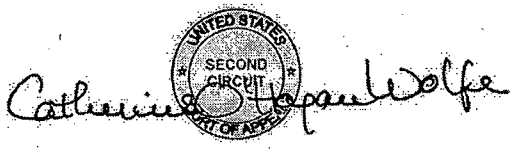
[2] The complaint does not state plainly that Smith is actually a covered offender, and he provides sparse information about his offense—an omission of some significance, because the residency restrictions apply only to inmates serving a sentence for "various enumerated sex offenses, when the victim of the offense was under the age of 18 at the time of the offense or . . . the defendant has been designated a level three sex offender." *Johnson*, 36 N.Y.3d at 196 (citing N.Y. Exec. Law § 259-c(14)). Smith appears to be serving a sentence on at least one enumerated offense, but does not plead whether he is a level three sex offender or that his victim was a minor. Nevertheless, we infer from the information allegedly provided by the prison counselor that he will be covered by SARA.

Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 687–92 (2d Cir. 2013) (discussing factors relevant to constitutional and prudential ripeness).

Because we affirm, we leave in place the district court's determination that Smith may bring a renewed action if he finds himself subjected to (or on the verge of being subjected to) the SARA residency restrictions in the future. We do not decide at this time, however, whether that claim would be cognizable under 42 U.S.C. § 1983, in whole or in part, or whether it instead should be raised via a petition for a writ of habeas corpus.

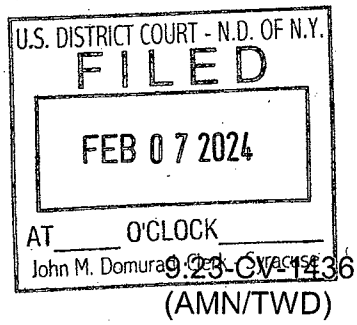
We have considered Smith's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



KEN SMITH,

Plaintiff,

v.

9:23-CV-1436
(AMN/TWD)

KATHLEEN C. HOCHUL, et al.,

Defendants.

APPEARANCES:

KEN SMITH
Plaintiff pro se
00-A-3811
Adirondack Correctional Facility
Box 110
Ray Brook, NY 12977

ANNE M. NARDACCI
United States District Judge

DECISION AND ORDER

I. INTRODUCTION

This action was commenced on or about November 7, 2023, in the United States District Court for the Southern District of New York ("Southern District") by pro se plaintiff Ken Smith ("plaintiff"), an inmate currently in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") at Adirondack Correctional Facility ("Adirondack C.F."). Dkt. No. 1 ("Compl.").

On November 8, 2023, Chief United States District Judge Laura Taylor Swain transferred this matter to this District because all of the facts giving rise to plaintiff's claims

occurred in Essex County, which is located in this District. Dkt. No. 4. Upon receipt of the transfer, this Court issued an Order administratively closing this action due to plaintiff's failure to comply with the filing fee requirements. Dkt. No. 6. On December 13, 2023, plaintiff filed a motion to proceed in forma pauperis ("IFP"). Dkt. No. 7 ("IFP Application").

II. IFP APPLICATION

"28 U.S.C. § 1915 permits an indigent litigant to commence an action in a federal court without prepayment of the filing fee that would ordinarily be charged." *Cash v. Bernstein*, No. 09-CV-1922, 2010 WL 5185047, at *1 (S.D.N.Y. Oct. 26, 2010).[1] "Although an indigent, incarcerated individual need not prepay the filing fee at the time of filing, he must subsequently pay the fee, to the extent he is able to do so, through periodic withdrawals from his inmate accounts." *Id.* (citing 28 U.S.C. § 1915(b) and *Harris v. City of New York*, 607 F.3d 18, 21 (2d Cir. 2010)).

Upon review of plaintiff's IFP Application, the Court finds that plaintiff has demonstrated sufficient economic need and filed the inmate authorization form required in the Northern District of New York. Dkt. No. 3. Plaintiff's IFP Application (Dkt. No. 7) is granted.

III. SUFFICIENCY OF THE COMPLAINT

A. Standard of Review

Having found that plaintiff meets the financial criteria for commencing this action IFP,

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[1] Section 1915(g) prohibits a prisoner from proceeding IFP where, absent a showing of "imminent danger of serious physical injury," a prisoner has filed three or more actions that were subsequently dismissed as frivolous, malicious, or failing to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(g). The Court has reviewed plaintiff's litigation history on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") Service. *See* http://pacer.uspci.uscourts.gov. It does not appear from that review that plaintiff had accumulated three strikes for purposes of 28 U.S.C. § 1915(g) as of the date this action was commenced.

and because plaintiff seeks relief from an officer or employee of a governmental entity, the Court must consider the sufficiency of the allegations set forth in the complaint in light of 28 U.S.C. §§ 1915(e) and 1915A. Section 1915(e) of Title 28 of the United States Code directs that, when a plaintiff seeks to proceed in forma pauperis, "the court shall dismiss the case at any time if the court determines that – . . . (B) the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).[2]

Similarly, under 28 U.S.C. § 1915A, a court must review any "complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity" and must "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

Additionally, when reviewing a complaint, the Court may also look to the Federal Rules of Civil Procedure. Rule 8 of the Federal Rules of Civil Procedure provides that a pleading which sets forth a claim for relief shall contain, *inter alia,* "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8 "is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata is applicable." *Hudson v. Artuz*, No. 95 Civ. 4768, 1998 WL 832708, at *1 (S.D.N.Y. Nov. 30, 1998) (quoting *Powell v. Marine Midland Bank*, No. 95-

[2] To determine whether an action is frivolous, a court must look to see whether the complaint "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

CV-0063 (TJM), 162 F.R.D. 15, 16 (N.D.N.Y. June 23, 1995) (other citations omitted)).

A court should not dismiss a complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Thus, a pleading that contains only allegations which "are so vague as to fail to give the defendants adequate notice of the claims against them" is subject to dismissal. *Sheehy v. Brown*, 335 F. App'x 102, 104 (2d Cir. 2009).

The Court will construe the allegations in the complaint with the utmost leniency. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding that a pro se litigant's complaint is to be held "to less stringent standards than formal pleadings drafted by lawyers.").

B. Summary of the Complaint

In July 2023, during a pre-parole interview, plaintiff's Offender Rehabilitation Coordinator ("ORC")[3] informed him about a "policy" enacted by DOCCS and the Department of Homeless Services ("DHS"). Compl. at 22. Pursuant to that "policy," paroled inmates are

[3] The complaint does not contain the name of the ORC and the ORC is not listed as a defendant herein.

placed on a wait list for admission into New York City area "SARA-compliant"[4] homeless shelters. *Id.* at 8, 20. Plaintiff was advised that DHS sets aside only ten beds per month for DOCCS at four SARA-compliant shelters. *Id.* As a result, "hundreds" of inmates are currently on the wait list and plaintiff can expect to wait two to three years for placement. *Id.* at 16, 18, 20. Other convicted felons are not subject to the same "policy." Compl. at 11.

The complaint also includes allegations related to the "statute" prohibiting sex offenders from "knowingly entering a publicly accessible area within 1,000 feet of a school or public park."[5] Compl. at 9-10. Plaintiff argues that convicted sex offenders, who are indigent, "cannot return to their family's residence or their community" due to "residence restrictions" enforced by the government. *Id.* at 11. Moreover, plaintiff claims that this statute infringes upon plaintiff's due process rights and his right to participate in "super Tuesday" or "general elections" because he cannot access voting machines that are 1,000 feet from "school grounds." *Id.* at 12-13.

Plaintiff claims he has "lost hope" due to the policy and statute. Compl. at 22.

Construed liberally,[6] the complaint contains Fourteenth Amendment due process and

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[4] "[A]ll social service districts are required by statute, regulation and directive to arrange temporary housing assistance for eligible homeless individuals, including those who are sex offenders." *See* 9 NYCRR § 8002.7(d)(3).

[5] The Sexual Assault Reform Act ("SARA") prohibits sex offenders from entering into or upon and living within 1,000 feet of a school. *See* N.Y. Exec. Law § 259-c(14).

[6] The Court is mindful of the Second Circuit's instruction that a pleading by a pro se litigant must be construed liberally and interpreted to raise the strongest arguments that it suggests. *See, e.g., Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008) ("On occasions too numerous to count, we have reminded district courts" that a pro se plaintiff's pleadings must be construed liberally); *Phillips v. Girdich*, 408 F.3d 124, 130 (2d Cir. 2005) ("We leave it for the district court to determine what other claims, if any, [plaintiff] has raised. In so doing, the court's imagination should be limited only by [plaintiff's] factual allegations, not by the legal claims set out in his pleadings."); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) ("[W]e read [a pro se litigant's] supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest.").

equal protection claims against defendants Governor Kathleen C. Hochul ("Hochul"), DOCCS Commissioner Daniel F. Martuscello, III ("Martuscello"), and DSS/DHS Commissioner Molly Wasow Park ("Park"). *See* Compl. at 5, 25. Plaintiff seeks monetary damages and injunctive relief. *Id.* at 20-22. For a more complete statement of plaintiff's claims, reference is made to the complaint.

IV. ANALYSIS

Plaintiff seeks relief pursuant to Section 1983, which establishes a cause of action for " 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990)); *see also Myers v. Wollowitz*, No. 95-CV-0272, 1995 WL 236245, at *2 (N.D.N.Y. Apr. 10, 1995) (McAvoy, C.J.) (finding that "[Section] 1983 is the vehicle by which individuals may seek redress for alleged violations of their constitutional rights"). "Section 1983 itself creates no substantive rights, [but] . . . only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James,* 13 F.3d 515, 519 (2d Cir. 1993). In order to maintain a Section 1983 action, a plaintiff must allege two essential elements. First, "the conduct complained of must have been committed by a person acting under color of state law." *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir.1994). Second, "the conduct complained of must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Id.*

"Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [Section] 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). As the Supreme Court has noted, a defendant may only be held

accountable for his actions under Section 1983. *See Iqbal*, 556 U.S. at 683 ("[P]etitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic.").

In order to prevail on a Section 1983 cause of action against an individual, a plaintiff must show "a tangible connection between the acts of a defendant and the injuries suffered." *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). This is true even for supervisory officials. *See Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020) ("There is no special rule for supervisor liability."). "[A] plaintiff must plead and prove 'that each Government-official defendant, [including supervisors,] through the official's own individual actions, has violated the Constitution.' " *Id.* (quoting *Iqbal*, 556 U.S. at 676).

Before assessing the merits of plaintiff's claims, the Court must address its power to hear those claims. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.") (citation omitted). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). "The [Federal court's] judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action . . . ." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (internal quotation marks omitted). Thus to demonstrate standing, "a plaintiff must allege injury that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.' " *Lujan v. Defenders*

of Wildlife, 504 U.S. 555, 560 (1992) (quotations omitted). "[S]tanding . . . must exist at the commencement of the litigation," and plaintiff must "allege facts that affirmatively and plausibly suggest that [he or she] has standing to sue." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016).

Further, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted). The purpose of the ripeness doctrine is to prevent the "premature adjudication of issues that may never arise." *Cooke v. Gen. Dynamics Corp.*, No. 3:95 CV 31 and No. 3:95 CV 170, 1998 WL 696013, at * 1 (D.Conn. Sept. 11, 1998); *see also Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir.1998) ("[A]n Article III court cannot entertain a claim which is based upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks and citations omitted)). Because the ripeness doctrine derives from Article III limitations on judicial power, the court may raise the issue sua sponte. *Reno v. Catholic Soc. Servs., Inc .*, 509 U.S. 43, 58 n. 18 (1993). "[W]hen resolution of an issue turns on whether there are nebulous future events so contingent in nature that there is no certainty they will ever occur, the case is not ripe for adjudication." *Thomas*, 143 F.3d at 34 (internal quotation marks and citations omitted).

In this matter, plaintiff is in DOCCS' custody at Adirondack C.F. Compl. at 1. Plaintiff is not eligible for parole until February 2025. *See* NYS DOCS Inmate Locator Website, available at http://nysdocslookup.docs.state.ny.us (last visited Jan. 19, 2024). The conditions of plaintiff's parole, assuming he can establish that he is entitled to parole, are unknown at

this time. *See Marone v. Greene Cnty. Prob. Dep't*, No. 1:08-CV-658 (LEK/RFT), 2008 WL 4693196, at *2 (N.D.N.Y. Oct. 22, 2008). Essentially, plaintiff's constitutional claims are based upon plaintiff's fears related to his hypothetical parole conditions "at some indeterminate point in the future[.]" *Birch v. Vincent*, 368 F.Supp. 532, 534 (S.D.N.Y. 1974) (dismissing the plaintiff's claims involving his fears related to a "hypothetical appearance before the parole board" on the doctrine of ripeness).

Consequently, plaintiff's constitutional challenges to presumed consequences of the wait list and SARA do not present an Article III case or controversy and are not ripe for judicial review. *See Marone*, 2008 WL 4693196, at *2 (holding that constitutional claims by the plaintiff, who was not eligible for parole for two years, related to the consequences of presumed denied participation in work release and parole programs, was not ripe for judicial review as he had not "yet endured any of the injuries he identifies will befall him."). Accordingly, plaintiff's constitutional claims are dismissed for failure to state a claim.

Ordinarily, a court should not dismiss a complaint filed by a pro se litigant without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir. 1991); *see also* Fed. R. Civ. P. 15(a) ("The court should freely give leave when justice so requires."). However, "a district court may deny [a pro se plaintiff] leave to amend when amendment would be futile." *Boddie v. New York State Div. of Parole*, No. 08-CV-911, 2009 WL 1033786, at *5 (E.D.N.Y. Apr. 17, 2009) (citations omitted).

In this matter, because plaintiff lacks standing and the matter is not ripe, an amendment would be futile. *See Schaut v. D.H.H.S.*, No. 6:14-CV-0910 (TJM), 2015 WL

4391277, at *8 (N.D.N.Y. July 14, 2015); *see also Fernandes v. California Corr. Health Care Servs.*, No. 2:16-CV-1411, 2016 WL 3549621, at *4 (E.D. Cal. June 30, 2016) (refusing to provide leave to amend where the plaintiff lacked standing and asserted only speculative injuries); *see also Kelly v. Herbst*, No. CV-12-27, 2012 WL 3647428, at *3 (D. Mont. May 10, 2012) (reasoning that the plaintiff could not cure the standing and ripeness deficiencies by amendment), *report and recommendation adopted*, 2012 WL 3647483 (D. Mont. Aug. 23, 2012).[7]

V. CONCLUSION

WHEREFORE, it is hereby

ORDERED that plaintiff's IFP Application (Dkt. No. 7) is **GRANTED**;[8] and it is further

ORDERED that plaintiff's complaint is dismissed without leave to amend; and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Decision and Order, on plaintiff in accordance with the Local Rules of Practice.

IT IS SO ORDERED.

Date: February 7, 2024
Albany, NY

Anne M. Nardacci
U.S. District Judge

[7] Dismissal is without leave to amend, but also without prejudice to a new action being commenced if and when plaintiff can establish standing and ripeness.

[8] Although his IFP Application has been granted, plaintiff will still be required to pay fees that he may incur in this action, including copying and/or witness fees.

Appendix C

Additional material from this filing is available in the Clerk's Office.